Supreme Court of the United States

OCTOBER TERM 1941

No. 1097

ODELL WALLER,

Petitioner,

against

RICE M. YOUELL, SUPERINTENDENT OF THE STATE PENITENTIARY, RICHMOND, VIRGINIA,

Respondent.

PETITION FOR REHEARING OF THE DENIAL OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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To the Honorable the Supreme Court of the United States:

Exceptional reasons, it is respectfully submitted, exist for the granting of rehearing herein.

The Governor of Virginia, *following denial by this Court on May 4, 1942 of certiorari herein without opinion,* has postponed petitioner's execution from May 19 to June 19, 1942, expressly for the purpose of permitting a petition for rehearing of such denial to be filed.

The present Governor and his predecessors have considered the constitutional questions presented by petitioner of sufficient importance that, with courageous and humane disregard of any political considerations, they thus have gone to the unusual length of granting petitioner four stays of execution in order that he might obtain answers to those questions from this Court.

The denial of certiorari without opinion affords no answer to those questions.

In determining whether those questions are entitled to specific answer, it is respectfully submitted that this Court may also properly consider the fact that it has only been possible to bring those questions before this Court as a "test case" by reason of the aid of public spirited citizens and of volunteer counsel, whose sole interest has been to determine whether protection exists against the violation of the apparent constitutional rights of an entire economic class of citizens who, because of their economic and political disabilities, are themselves powerless to protect those rights.

The constitutional and procedural questions left unanswered by the mere denial of certiorari without opinion are the following:

Was certiorari denied because:

1. The equal protection clause of the Fourteenth Amendment is limited to systematic exclusion from grand and petit juries solely because of race or color?

2. Even if not so limited, and even though that clause would extend to systematic exclusion because of religion, politics or nativity, it nevertheless does not extend to such exclusion, because of its economic disabilities, of petitioner's entire class?

3. Even though the equal protection clause would otherwise extend to such systematic exclusion of petitioner's entire economic class from grand and petit juries, no remedy is available by habeas corpus or otherwise, and petitioner must die, solely because of the error of his trial counsel as to the procedure necessary to establish the undenied and undeniable facts of such exclusion?

Counsel most respectfully submit that petitioner, being under sentence of death, is peculiarly entitled to an answer to these questions, and to have them answered only after the fullest presentation and consideration; that neither full presentation or consideration is possible

under the limitations prescribed by the rules of this Court both upon briefs in support of petitions for certiorari and upon petitions for rehearing; that unless this Court does answer these constitutional and procedural questions, the future administration of criminal law in the State of Virginia will be left in hopeless and unnecessary confusion, and this Court will be burdened with further appeals for review which must prove either unnecessary or futile.

Finally, counsel most respectfully submit that if rehearing is granted, it is their profound conviction that, on the following grounds, this Court, on further and mature consideration of the questions here involved, must conclude that petitioner's constitutional rights have clearly been violated; that habeas corpus affords a clear and proper remedy for such violation; and therefore either that certiorari should issue to review the judgment of the Supreme Court of Appeals of Virginia denying habeas corpus, or that this Court should issue to petitioner its own original writ of habeas corpus or expressly recognize the right of a lower Federal court to issue that writ.

The following are specific grounds on which it is submitted rehearing should be granted, and that thereupon either certiorari should issue, or this Court should expressly recognize petitioner's right to a writ of habeas corpus, either from this Court or from a lower Federal court.

1. *The denial of certiorari here would seem in necessary conflict with the recent decisions of this Court in* Waley v. Johnston, —— U. S. ——, 86 L. Ed. 932, *and* Bowen v. Johnston, 306 U. S. 19,* *holding that a judgment of conviction, even though not void for want of jurisdiction of the trial court, is properly reviewable on habeas corpus,*

* Counsel regret that they failed in their brief in support of the petition for certiorari to call the attention of this Court to the relevance of certain decisions now cited for the first time in this petition.

(a) *If, as here, such conviction was in disregard of petitioner's constitutional rights;*

(b) *If, as here, the facts relied on to show such violation are dehors the record and their effect on the judgment of conviction was not open to consideration and review on appeal, and*

(c) *If, as here, the writ of habeas corpus is the only effective means of preserving petitioner's constitutional rights.*

2. *The decisions in* Waley v. Johnston, supra, *and* Bowen v. Johnston, supra, *though directed to judgments of conviction in Federal courts, would seem no less applicable to petitioner's conviction in a State court where, as here, all state remedies have been exhausted,* Hale v. Crawford, 65 Fed. (2d) 739, 747 (certiorari denied 290 U. S. 674).

3. *Even should this Court finally deny certiorari here, this would not, under Moore* v. *Dempsey,* 261 U. S. 86, *constitute a bar to petitioner's right to a writ of habeas corpus from the United States District Court for the Eastern District of Virginia, even though the petition for such writ of habeas corpus were to be based on exactly the same grounds here presented to this Court by the petition for certiorari.*

4. *The decisions in Wood* v. *Brush,* 140 U. S. 278 and *Andrews* v. *Swartz,* 156 U. S. 272, *cited in respondent's brief in opposition, are clearly inapplicable to petitioner's case. In those cases, habeas corpus was held not to afford a proper remedy to review the judgments of conviction in the state courts there involved, (a) because, before applying to a Federal court for habeas corpus, the accused had not resorted to direct review by this Court, available there, but not here, as a matter of right; (b) because there, upon direct review, the question of violation of con-*

stitutional rights could have been determined, since there, unlike here, the facts constituting such violation appeared of record in the trial court.

5. *Assuming that petitioner might have waived his constitutional right to indictment and trial by juries from which his economic peers had not been systematically excluded, it would seem that, consistently with* Patton v. U. S., 281 U. S. 276, *and* Johnson v. Zerbst, 304 U. S. 458, *there could be no such waiver except by petitioner's "express and intelligent consent", and that no mere error of petitioner's counsel as to the procedure necessary to establish violation of such constitutional rights could constitute such waiver.*

6. *It would appear that this Court could not hold that the equal protection clause of the Fourteenth Amendment is limited to denial because of race or color, in view of its decisions, not heretofore cited, in which this Court has expressly held that clause to extend to inanimate corporations, of no race and no color.*

Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26;

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232;

Covington & L. Turnp. Road Co. v. Sanford, 164 U. S. 579;

Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U. S. 544;

Power Mfg. Co. v. Saunders, 274 U. S. 490.

7. *Exclusion of non-payers of poll taxes from jury service is in reality a means of indirect exclusion because of race and color, since, as alleged in the petition for certiorari, p. 9, negroes constitute a large proportion of the persons so barred. Moreover it has the advantage of avoiding the recognized illegality of direct exclusion on account of race and color, with the added advantage of also excluding poor whites as well as negroes.*

8. *Finally, the denial here of certiorari, without opinion,*

(a) *Leaves the future administration of criminal law in the State of Virginia in hopeless and unnecessary confusion;*

(b) *May well burden this Court with appeals for review in future cases, which must prove either futile or unnecessary;*

(c) *Constitutes a practical bar to a remedy otherwise clearly available under the decisions in* Moore v. Dempsey, supra, *and* Hale v. Crawford, supra, *that is, a petition for habeas corpus to the United States District Court for the Eastern District of Virginia.*

(d) *Most important to petitioner, it leaves petitioner's counsel without any basis for forming an intelligent judgment as to whether petitioner has the Constitutional rights here claimed; whether those rights have been violated; whether remedy exists for their violation under Moore* v. *Dempsey, supra, and Hale* v. *Crawford, supra; and, if so, what is the proper procedure to obtain such remedy.*

Counsel trust that in view of the importance of the questions presented by the foregoing grounds, this Court will not consider a further brief exposition of certain of those grounds to exceed the limits placed by its rules on petitions for rehearing.

I

It would seem that consistently with *Waley* v. *Johnston, supra,* and *Bowen* v. *Johnston, supra,* this Court should grant certiorari herein and thereupon require the Supreme Court of Appeals of Virginia to issue its writ of habeas corpus or, consistently with *Moore* v. *Dempsey, supra* and *Hale* v. *Crawford, supra,* this Court should expressly recognize the right of petitioner either to obtain a writ of habeas corpus from the United States District Court for the Eastern District of Virginia or to obtain from this Court its own original writ of habeas corpus.

***Wood* v. *Brush* and *Andrews* v. *Swartz, supra,* distinguished.**

It has long been contended, and the respondent so contends in his brief in opposition, that a conviction cannot be reviewed by habeas corpus unless the judgment of conviction be void for want of jurisdiction of the trial court to render it. Prior language of this court, taken out of its context, has lent color to such contentions. The recent decisions of this court, however, in *Waley* v. *Johnston, supra,* and *Bowen* v. *Johnston, supra,* make such contentions no longer tenable.

Those decisions make it clear that while want of jurisdiction of the trial court to render a judgment of conviction affords *one ground* for habeas corpus, *it is not the sole ground.*

On the contrary, it is clear from those cases that violation of constitutional rights in the conviction of an accused, in itself affords proper ground for habeas corpus, even though the judgment of conviction is not void for want of jurisdiction:*

* Indeed, this is no new doctrine. The limitations imposed by the rules of this Court, on petitions for rehearing, do not permit of an adequate discussion of former decisions of this Court to substantially this same effect. Attention, however, is directed to the language of this Court in this respect in two of its early decisions.

(Footnote continued on next page)

(a) if the facts relied on to show such violation are dehors the record;

(b) if the effect of those facts on the judgment of conviction was not open to consideration and review on appeal; and

(c) if the writ of habeas corpus is the only effective means of preserving such constitutional rights.

In *Ex Parte Lange,* 18 Wall. 163, this Court, in discharging the petitioner there, upon this Court's original writ of habeas corpus, said, pages 175-176:

> "But it has been said that, conceding all this, the judgment under which the prisoner is now held is erroneous, but not void; and as this court cannot review that judgment for error, it can discharge the prisoner only when it is void.
>
> But we do not concede the major premise in this argument. A judgment may be erroneous and not void and it may be erroneous because it is void. The distinctions between void and merely voidable judgments are very nice and they may fall under the one class or the other as they are regarded for different purposes."

In *Ex Parte Neilson,* 131 U. S. 176, this Court, in reversing denial of habeas corpus by a district court, said, page 182:

> "The objection to the remedy of habeas corpus, of course, would be that there was in force a regular judgment of conviction, which could not be questioned collaterally, as it would have to be on habeas corpus. But there are exceptions to this rule which have more than once been acted upon by this court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus. This was so decided in the cases of *Ex Parte Lange,* 85 U. S. 18 Wall. 163 and *Ex Parte Siebold,* 100 U. S. 371 and in several other cases referred to therein."

At pages 183-184, this Court further said:

> "It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant."

Furthermore, Mr. Chief Justice Hughes, in *Bowen* v. *Johnston,* made it clear that while this court ordinarily will not review by habeas corpus a judgment of conviction even of a Federal court, where the right to direct review by this court exists, and has not been exhausted, this has not been because of any question of power to make such review by habeas corpus, but a question of the appropriate exercise of such power.

Finally, it is pointed out in *Hale* v. *Crawford, supra,* that the ordinary rule that habeas corpus may not be used to review a judgment of conviction in a State court, even though such judgment violates constitutional rights, unless not only State remedies but any right to direct review by this court of their denial have been exhausted, was a rule of procedure which grew up prior to the amendment of the Judiciary Act of 1925, when direct review by this court under a writ of error was a matter of right; that since that amendment changed review by this court to a matter of discretion under certiorari, a Federal court now can review such judgment by habeas corpus, even after this court has denied review by certiorari. (See in this latter respect subsequent discussion under Point II of Moore v. Dempsey, 261 U. S. 86.)

For the convenience of this Court, brief quotation will accordingly be made from the foregoing cases.

In *Waley* v. *Johnston, supra,* this Court said, page 934:

> "The issue here was appropriately raised by the habeas corpus petition. *The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts* to test the constitutional validity of a conviction for crime *is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused,*

and where the writ is the only effective means of preserving his rights. Moore v. Dempsey, 261 U. S. 86; Mooney v. Holohan, 294 U. S. 103, Bowen v. Johnston, 306 U. S. 19."

In *Bowen* v. *Johnston, supra,* Chief Justice Hughes said, pages 23-24:

"The scope of review on habeas corpus is limited to the examination of the jurisdiction of the court whose judgment of conviction is challenged. (Citing decisions.) But if it be found that the court had no jurisdiction to try the petitioner, *or that in its proceedings his constitutional rights have been denied, the remedy of habeas corpus is available.* Ex Parte Lange, 18 Wall. 163; Ex parte Crow Dog, 109 U. S. 556; Re Snow, 120 U. S. 274; Re Coy, 127 U. S. 751; Re Nielsen, 131 U. S. 176; Re Bonner, 151 U. S. 242; Moore v. Dempsey, 271 U. S. 86; Johnson v. Zerbst, 304 U. S. 458."

The Chief Justice further said, pages 26-27:

"It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired. Ex parte Lange, 18 Wall. 163, supra. *The rule requiring resort to appellate procedure* when the trial court has determined its own jurisdiction of an offense *is not a rule denying the power to issue a writ of habeas corpus* when it appears that nevertheless the trial court was without jurisdiction. *The rule is not one defining power but one which relates to the appropriate exercise of power.* It has special application where there are essential questions of fact determinable by the trial court. Rodman v. Pothier, 264 U. S. 399, supra. It is applicable also to the determination in ordinary cases of disputed matters of law whether they relate to the sufficiency of the indictment or to the validity of the statute on which the charge is based. Ibid; Glasgow v. Moyer, 225 U. S. 420, supra; Henry v. Henkel, 235 U. S. 219, supra. *But it is equally true that the rule is not so*

inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent."

In *Hale* v. *Crawford, supra,* the Circuit Court of Appeals for the First Circuit said, page 747 of its decision, in referring, among other cases, to *Andrews* v. *Swartz,* and *Wood* v. *Brush, supra*:

"Counsel for Crawford contend that these cases are not applicable for, if he were remitted to Virginia and seasonably and properly raised the question here under consideration and the question was decided against him, at the present time and under the Judiciary Act of 1925, he could not, as of right, prosecute a writ of error from the Supreme Court of the United States to the highest court of the state of Virginia to which the case could be taken. *It is true that his right of review by writ of error from the Supreme Court of the United States on the facts of this case was taken away by the act of 1925,* for under the law as it now stands no writ of error lies from the Supreme Court in this case, as the grand jury was not drawn under a statute of the state of Virginia which violated the Constitution of the United States. 43 Stat. 936, 937, c. 229, § 237 (28 USCA § 344). *He is, however, permitted by that act to apply to that court for certiorari, a discretionary writ.* South Carolina v. Bailey, supra. *If review on such application is not granted he undoubtedly, at that stage of the proceeding, could have the matter reviewed on habeas corpus in the proper federal court, being without review in the Supreme Court on writ of error as of right.* In re Royall, 117 U. S. 241, 252, 253, 6 S. Ct. 734, 29 L. Ed. 868; In re Wood, supra, 140 U. S. at pages 289, 290, 11 S. Ct. 738, 35 L. Ed. 505. *It would not then be an endeavor by habeas corpus to intervene before trial or to review what ordinarily can be reexamined only on writ of error; and the federal court applied to could not, under such circumstances, properly refuse review on habeas corpus.*"

Petitioner's case, it is submitted, meets every condition which, under the principles of the foregoing decisions, would make habeas corpus a proper remedy to review petitioner's conviction. Moreover, it is submitted, petitioner's case is clearly distinguishable from *Andrews* v. *Swartz, supra,* and *Wood* v. *Brush, supra,* where, on the record in those cases, resort to habeas corpus was held improper.

In *Andrews* v. *Swartz, supra,* and *Wood* v. *Brush,* resort to habeas corpus was held improper on two grounds: First, because although state remedies had been exhausted, the accused, before applying to a Federal court for habeas corpus, had not resorted to the direct review of the judgment of the State court there available from this Court as a matter of right by writ of error. Second, because there, upon direct review, the question of violation of constitutional rights could have been determined, since the facts constituting such violation appeared of record in the trial court.

Here, on the contrary, while State remedies have unquestionably been exhausted, no right of direct review by this Court of the judgment of the State court was ever available as a matter of right by writ of error, but only as a matter of discretion by certiorari.

Here, moreover, the facts relied on to show violation of petitioner's constitutional rights are dehors the record, and, therefore, those facts and their effect on the judgment of conviction would not have been open to consideration and review by this Court on direct review by certiorari of the judgment of conviction.

Here, therefore, the writ of habeas corpus is and at all times has been the only effective means on this record of preserving petitioner's constitutional rights.

It would seem, therefore, that, under the cases cited, and in particular under *Bowen* v. *Johnston, supra,* taken in connection with *Hale* v. *Crawford, supra,* the petitioner is entitled to obtain by some means a writ of habeas corpus to review his judgment of conviction.

In this connection, the decision of this Court in *Moore* v. *Dempsey, supra,* makes it clear that, even if this Court should finally deny certiorari here, this would constitute no legal bar to an application to the United States District Court for the Eastern District of Virginia for a writ of habeas corpus, even though such application were based on the same grounds presented to this Court by the petition for certiorari. In all probability, however, should this Court persist in its refusal to state its grounds for denial of certiorari, the District Court would deny the writ, on the assumption that such denial means either that petitioner's constitutional rights have not been violated, or that, if they have, petitioner is without remedy because of the error of his trial counsel in failing to prove in the trial court the facts of such violation. However, in such event, it would seem that, under *Moore* v. *Dempsey,* this Court should nevertheless require the District Court to issue habeas corpus.

Since *Moore* v. *Dempsey* would seem thus to be of compelling significance here, that decision will be briefly discussed.

II

Under *Moore* v. *Dempsey*, 261 U. S. 86, even should this Court finally deny certiorari here, this would not constitute a bar to petitioner's right to a writ of habeas corpus from the United States District Court for the Eastern District of Virginia, even though the petition for such writ of habeas corpus were to be based on exactly the same grounds here presented to this Court by the petition for certiorari.

In *Moore* v. *Dempsey, supra,* this Court, although it had previously denied certiorari to review on constitutional grounds the judgment of conviction in the state court, and had also denied a writ of error to review a later denial of habeas corpus by the state court, held habeas corpus nevertheless available from the appropriate Federal district court, even though the grounds alleged for habeas corpus were identical with the grounds presented by the petitions for certiorari and for writ of error, previously denied by this Court.

In *Moore* v. *Dempsey,* this Court, on appeal, reversed an order of the District Court for the Eastern District of Arkansas, dismissing a writ of habeas corpus, and thereupon required the District Court to issue the writ. Moreover, this Court, speaking through Mr. Justice Holmes, required the issuance of habeas corpus by the District Court, in spite of the following facts pointed out in the dissenting opinion of Mr. Justice McReynolds, joined in by Mr. Justice Sutherland.

It there appears, page 98:

> "A petition for certiorari, filed in this court May 24, 1920, with the record of proceedings in the state courts, set forth in detail the very grounds of complaint now before us. It was presented October 5th, denied October 11th, 1920.

> April 29, 1921, the governor directed execution of the defendants on June 10th. June 8th the chancery court of Pulaski county granted them a writ of habeas corpus; on June 20th the state supreme court held that the chancery court lacked jurisdiction and prohibited further proceedings. State v. Martineau, 149 Ark. 237, 232 S. D. 609. August 4th a justice of this court denied writ of error. Thereupon, the governor fixed September 23rd, for execution. On September 21st the present habeas corpus proceeding began, and since then the matter has been in the courts."

It is also significant to note that it appears from the same page of the opinion that one of the grounds alleged, not only for habeas corpus, but previously for certiorari and for writ of error, was the systematic exclusion of negroes from grand and petit juries in the State of Arkansas.

It would seem not unreasonable to assume from this statement of the record in *Moore* v. *Dempsey* that one of the grounds for the dismissal of the writ of habeas corpus by the District Court may well have been the fact that this Court, had denied, *without opinion*, both the prior petition for certiorari and the prior application for writ of error. Nor, as has already been suggested, is it unreasonable to assume that were petitioner here to make application for habeas corpus to the District Court for the Eastern District of Virginia, that Court, in the face of a denial of certiorari by this Court *without opinion*, would likewise deny habeas corpus.

In such event, petitioner, due to the amendments of 1925 to the Judiciary Act, could not have, as had the petitioners in *Moore* v. *Dempsey*, review by this Court of such denial as a matter of right, or even review as of right by the Circuit Court of Appeals. On the contrary, petitioner could not even have appeal to the Circuit Court of Appeals except on a certificate of probable cause either by that

Court or by the District Court, (Title 28, Sec. 466, U. S. C. A.). Furthermore, should both the District Court and the Circuit Court of Appeals refuse such certificate, no appeal would lie to this Court (Title 28, Sec. 345, U. S. C. A.), and this Court would be without jurisdiction even to grant certiorari (Title 28, Sec. 347, U. S. C. A.). Therefore, should the right to appeal to the Circuit Court of Appeals be denied, petitioner's only recourse would be an application to this Court for an original writ of habeas corpus.

This, indeed, was the very situation which arose in *Mooney* v. *Holohan,* 294 U. S. 103. In that case, prior to the application to this Court for an original writ of habeas corpus, a certificate of probable cause for appeal to the Circuit Court of Appeals from the denial of the writ by the District Court, had been refused both by the District Court and by the Circuit Court of Appeals. On representation of these facts to this Court in the petition to it in the *Mooney* case for an original writ of habeas corpus, this Court thereupon recognized the right to apply to this Court for such original writ. Presumably, petitioner, under similar circumstances, here would have a similar right.

The question remains whether this Court, therefore, should put petitioner, who is under sentence of death and in indigent circumstances, to the circuity of action which would be involved in a petition to the United States District Court for the Eastern District of Virginia for habeas corpus, should this Court here finally deny certiorari.

Counsel most respectfully submit that the more appropriate and orderly procedure would be for this Court to grant rehearing herein, and thereupon to require the Supreme Court of Appeals of Virginia to accord petitioner its writ of habeas corpus. Should this Court fail to do this, petitioner's only practical remedy would seem to be an application direct to this Court for its own original writ of habeas corpus.

III

Assuming that petitioner might have waived his constitutional right to indictment and trial by juries from which his economic peers have not been systematically excluded, this court should hold that, consistently with the principles of *Patton* v. *United States,* 281 U. S. 276 and *Johnson* v. *Zerbst,* 304 U. S. 458, such waiver could only be by petitioners "express and intelligent consent," and that no mere error of petitioner's counsel could constitute such waiver.

In *Carruthers* v. *Reed,* 102 Fed. 933, the Court said, in connection with the systematic exclusion of negroes from grand and petit juries, page 939:

> "The right to challenge the panel (for systematic exclusion of negroes) is a right that may be waived and is waived if not seasonably presented."

There the Court noted, page 938, however, that the record expressly showed that counsel for accused had deliberately waived the right to make such challenge, concluding after mature consideration, first, that to raise the question might prejudice his client's interests, and, second, that the jury panel was a favorable one or, as he expressed it, "a very good jury".

The record here shows no such waiver before the trial court, even by petitioner's counsel. On the contrary, it shows that petitioner's counsel specifically moved to quash both the grand and petit juries, as violating petitioner's right to equal protection of the laws by reason of the systematic exclusion therefrom of non-payers of poll taxes, constituting petitioner's entire economic class (R. 18-19, Ex. 1, pp. 31-32). Moreover, it shows that petitioner's trial counsel did not offer evidence of the facts of such exclusion, first, because of their erroneous belief that the Constitution and laws of Virginia required such exclusion as a matter of law (R. 18-19, Ex. 1, pp. 59-60) and second,

because of their failure to take the precaution of proving the facts of such exclusion, lest the Supreme Court of Appeals of Virginia should, as it subsequently did, specifically hold that such exclusion was not required by law. Moreover, the record shows that, on the writ of error to the Supreme Court of Appeals to review petitioner's conviction (R. 18-19, Ex. 1, pp. 5-10), petitioner's counsel again specifically alleged unconstitutional exclusion, still, however, on the assumption that it was required by the Constitution and laws of Virginia, a point not theretofore specifically decided by that Court.

It would seem clear that neither the error of petitioner's counsel, in assuming that the Constitution and laws of Virginia required such exclusion, nor their error as to the necessity of proof of the facts of such exclusion, could constitute a waiver of petitioner's constitutional rights against such exclusion.

On the contrary, it would seem that this Court should hold that, consistently with the principles declared by this Court in *Patton* v. *United States, supra,* and *Johnson* v. *Zerbst, supra,* as to the safeguards against the waiving of constitutional rights, petitioner's constitutional rights could not here have been waived except by petitioner's own "express and intelligent consent".

It is true that in *Patton* v. *United States, supra,* waiver of the constitutional right there involved was the right to trial by jury at all, while, in *Johnson* v. *Zerbst, supra,* it was the right to protection of counsel.

It would seem that no reason can be advanced, however, why like safeguards should not attend any waiver of petitioner's right to indictment and trial by a constitutional jury. On the contrary, this Court has recently said in the case of *Glasser* v. *United States,* —— U. S. ——, 86 Law Ed. 405, 412:

> "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights."

On this record, it is clear that there was no "express and intelligent consent" by petitioner to any waiver of his constitutional rights to trial by a jury from which his economic peers had not been systematically excluded. On the contrary, it must be assumed that petitioner intended to insist on those rights and relied, as he had a right to do, upon his counsel for their adequate protection. The error of his counsel as to what procedure was necessary adequately to protect those rights certainly should not be held the equivalent of "express and intelligent consent" to the waiver of them by petitioner.

IV

It would appear that this Court could not have denied certiorari on the ground that the equal protection clause of the 14th Amendment is limited to denials solely because of race or color, in view of its decisions, not heretofore cited, in which this Court has held that clause to extend to inanimate corporations, of no race and no color.

Counsel in their brief in support of the petition for certiorari failed to call the attention of this Court to the following decisions in which it has directly held that the equal protection clause of the 14th Amendment extends to corporations:

Minneapolis & St. L. R. Co. v. *Beckwith,* 129 U. S. 26;
Bell's Gap R. Co. v. *Pennsylvania,* 134 U. S. 232;
Covington & L. Turnp. Road Co. v. *Sandford,* 164 U. S. 579;

Kentucky Finance Corp. v. *Paramount Auto Exchange Corp.*, 262 U. S. 544;
Power Mfg. Co. v. *Saunders*, 274 U. S. 490.

Moreover, counsel failed to make clear the real significance of the decision of this Court in *American Sugar Refining Company* v. *Louisiana*, 179 U. S. 89, referred to at page 9 of that brief. While, in that case, this Court held that the State license tax there in question did not arbitrarily discriminate against the corporation there affected, this Court implicitly recognized that, had such tax done so, the provisions of the equal protection clause of the 14th Amendment would have applied to the corporation.

Furthermore the language quoted, from that case, and from other cases at pages 4 to 14 of the brief in support of the petition for certiorari, would seem to make clear that, since the equal protection clause of the 14th Amendment is not limited to denials because of race or color, it must extend not only to denials because of politics, religion and nativity, but to denials because of economic disabilities of a particular class, or to any other arbitrary class discrimination.

Finally, on this point, as shown at p. 9 of the petition for certiorari, and at pp. 14-22 of the brief in support of that petition, poll taxes in Virginia are, in reality, a means of indirect exclusion because of race or color, since negroes constitute a large proportion of those unable to pay poll taxes on account of their economic disabilities; that, as such, poll taxes avoid the patent illegality of direct exclusion on account of race or color, and have the added advantage of killing two birds with one stone, in that they exclude poor whites as well as negroes.

V

The denial of certiorari without opinion leaves the future administration of criminal law in the State of Virginia in hopeless and unnecessary confusion, and, unless this court at least states the grounds of such denial, this court will undoubtedly be burdened with appeals for review, in future cases, which must prove either futile or unnecessary.

It is respectfully submitted that this Court should keep in mind that the sworn facts presented by the petition for habeas corpus to the Supreme Court of Appeals of Virginia, showing the systematic exclusion of non-payers of poll taxes from grand and petit jury service, stand undenied on this record. Moreover, counsel submit, those facts cannot be denied.

It must be clear, therefore, that, until this Court expressly states whether certiorari was here denied because the 14th Amendment does not extend to such systematic exclusion of petitioner's entire economic class, or was denied because of the error of petitioner's trial counsel in failing to prove the facts of such exclusion on the record before the trial court, the State of Virginia may well continue to practice such exclusion, and its courts may and undoubtedly will reject or disregard proof of such exclusion, if such proof be made or offered.

On the other hand, counsel for defendants in future cases cannot know whether grand or petit juries are open to challenge because of such systematic exclusion, and whether, therefore, it will be futile to offer proof of such exclusion or, should such proof be made and the courts of Virginia reject or disregard it, whether appeal to this Court for review will be warranted or will be wholly futile.

Most important to petitioner, however, is the fact that denial of certiorari without opinion leaves petitioner's counsel without any basis for forming an intelligent judgment as to whether petitioner has the constitutional rights here claimed; whether those rights have been violated; whether remedy exists for their violation under *Moore* v. *Dempsey* and *Hale* v. *Crawford, supra,* and, if so, what is the proper procedure to obtain such remedy.

Conclusion

In *Pierre* v. *Louisiana,* 306 U. S. 354, this Court said, page 358:

> "Indictment by a Grand Jury and trial by a jury cease to harmonize with our traditional concepts of justice at the very moment *particular groups, classes* or races—otherwise qualified to serve as juries in a community—are excluded from such jury service."

In *Smith* v. *Texas,* 311 U. S. 128, this Court said, page 130:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws under it but is at war with our basic concepts of a democratic society and a representative government."

Though both those cases specifically involved only the exclusion of negroes from jury service, it would seem improbable that this Court would now hold that the principles there announced were intended to be confined solely to exclusion solely because of race or color. The express language, particularly in *Pierre* v. *Louisiana,* would seem to preclude any such limitation.

Furthermore, it seems incredible that this Court could hold that the fundamental rights recognized by those principles can be protected only if the facts of their violation can be presented to this Court on certiorari to review a judgment of conviction obtained in violation of those rights, and that such rights cannot be protected where, as here, the undenied facts of violation can only be presented on habeas corpus, because of absence of proof of them in the record before the trial court. So to hold would make the protection of constitutional rights depend, not upon the undenied facts of their violation, but upon the procedure by which those facts are shown to this Court.

Finally, counsel here feel a heavy responsibility to this Court and to the petitioner in having failed in their brief in support of the petition for certiorari to present to this Court certain of the foregoing matters which now, for the first time, are called to its attention by this petition for rehearing.

Counsel most earnestly submit, however, that neither such failure on the part of counsel here, nor any error of trial counsel as to the procedure necessary to bring before this Court the undenied and undeniable facts of violation of petitioner's constitutional rights, should now prevent further and more mature consideration of the questions here presented, and certainly could not justify permitting the execution of petitioner in violation of his constitutional rights.

It is therefore respectfully submitted that this Court should grant rehearing herein and that, upon such rehearing, this Court should either

(a) Issue its writ of certiorari to the Supreme Court of Appeals of Virginia requiring that Court to issue a writ of habeas corpus; or

(b) Expressly recognize petitioner's right to obtain a writ of habeas corpus either from the United States District Court for the Eastern District of Virginia or from this Court itself.

For the reasons already given the first procedure would seem the more appropriate and orderly.

Respectfully submitted,

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Certificate

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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